

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE

November 29, 2005, Session

**DEBRA ANN SEYBOLD v. CLARKSVILLE MONTGOMERY COUNTY  
SCHOOL SYSTEM**

**Direct Appeal from the Chancery Court for Montgomery County  
No. 2002-03-0034 Carol Catalano, Chancellor**

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**No. M2005-00259-WC-R3-CV - Mailed - March 10, 2006  
Filed - April 11, 2006**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court our findings of fact and conclusions of law. In this appeal, the employee asserts that the trial court erred in finding that the employee failed to prove a work-related injury and in dismissing her claim for workers' compensation benefits. We conclude that the evidence presented does not preponderate against the findings of the trial judge and, in accordance with Tennessee Code Annotated §50-6-225(e)(2), affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Trial Court  
Affirmed.**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and WILLIAM H. INMAN, joined.

Thomas A. Travaglini, Madison, Tennessee, for the Appellant, Debra Ann Seybold.

Suzanne Pearson, Clarksville, Tennessee, for the Appellee, Clarksville Montgomery County School System.

## MEMORANDUM OPINION

### I. FACTUAL BACKGROUND

Debra Ann Seybold was forty-eight years of age at the time of the trial of this case. Prior to going to work for the Clarksville Montgomery County School System (CMCSS) she had been employed for eleven years by the Milwaukee Police Department as a patrol officer.

She began working in CMCSS in 1992, as a school bus driver and continued driving until February 8, 2001, except for two years when she worked as a teacher's aid. On the morning of January 4, 2000, Ms. Seybold related she was conducting her pre-route inspection of the bus. As she lifted the motor cover located in the interior of the bus next to the driver's seat, she felt a sharp pain in her lower back going into her right leg. She was able to go ahead and finish her routes for the day by taking Ibuprofen but the next day when she lifted the engine cover, she again felt a sharp stabbing pain in the lower back running into her right leg. Although she was very uncomfortable, she completed her morning routes and then had her husband take her to a chiropractor. She reported the injury to her employer.

Ms. Seybold saw a series of doctors before choosing Dr. Zellem from a panel of doctors offered her by the company managing her workers' compensation claim. When she went to see Dr. Zellem she was experiencing severe pain in her back and right leg and numbness in the left calf. After unsuccessful attempts at relieving her pain through therapy and medication, Dr. Zellem performed surgery. According to Ms. Seybold, surgery failed to relieve her symptoms. She returned to driving the bus in August 2000, but experienced worsening problems with her lower back and leg.

After seeking a second opinion from another neurosurgeon, she returned to Dr. Zellem in February 2001. Dr. Zellem indicated there was nothing further he could do for her medically to improve her condition and referred her to Dr. Robert Clendenin. Dr. Clendenin put her on medication that Ms. Seybold says failed to relieve her pain and released her to return to work on March 19, 2001.

Ms. Seybold was referred by her personal physician to Dr. Richard Berkman. Dr. Berkman examined Ms. Seybold and referred her to Dr. Culclasure for pain management. Dr. Culclasure prescribed a trial dorsal column stimulator. It helped her condition and in 2002 a permanent dorsal column stimulator was inserted.

Ms. Seybold described her pain as constant, rendering her unable to perform household chores or to engage in her previous recreational activities. She indicated she had trouble sleeping. Ms. Seybold testified the permanent dorsal column stimulator has helped her legs but not the lower back. She is better able to walk without severe pain. The stimulator will have to be maintained in that the internal battery has to be replaced about every eighteen months.

Ms. Seybold admitted that she had low back problems prior to January 2000, but in her discovery deposition and initially at trial indicated the previous pain was not stabbing or sharp and did not radiate down her right leg. She also indicated she had problems with her right leg while working at the police department but said it was less severe. On cross-examination, Ms. Seybold admitted she had a motor vehicle accident in June 1985 in which she injured her back and a separate injury that occurred on May 13, 1990, when lifting a drunk prisoner into a wheel chair. Both of those injuries were lumbar strains according to her doctors. She again testified she had back pain but the pain did not radiate into her legs.

Ms. Seybold acknowledged, however, she had prepared a report to the Captain of Police of the Milwaukee Police Department in which she stated,

I have been and still am experiencing severe back pain from duty related injuries, the latest injury of May 10, 1990. I have since then returned to work on limited light duty work in communications as of June 21, 1990 with no relief of severe pain in my back, going into my legs. I am on medication (Ibuprofen, Flexerial, and a TENS unit) since January 23, 1985, the TENS unit added just recently to relieve the pain at home and at work with negative results!

Ms. Seybold recalled a series of sixteen different injuries to her back during the time that she worked for the Milwaukee Police Department. She also admitted to being off work for extended periods of time because of her back and leg pain. During that time she also reported trouble with light house work. She had pain lifting and bending. She injured her back pulling a drainplug in 1999, the year before the incident for which she has claimed benefits.

At trial, Ms. Seybold initially did not recall claiming a permanent injury when she left the Milwaukee Police Department. When shown the compromise agreement clearly indicating that she claimed she had sustained temporary total disability and permanent partial disability as a result of an accident, she admitted signing the document.

Ricky Dell Lumpkin, transportation manager with the CMCSS Bus Transportation Department, testified Ms. Seybold returned to work following her surgery in August 2000 and worked up until February 2001. During that time there were no complaints with her performance. In February 2001, she stated that her lawyer did not want her to resume working.

Earnie Rice, a private investigator, made a video tape of Ms. Seybold's activities on the morning of October 22, 2004, four days prior to trial. The tape shows Ms. Seybold engaged in varying activities such as moving about in a pasture with her horses, bending over to pick up a cat, stooping under fence, climbing steps, coming out of the house with a suitcase in one hand and a package under her arm, all without apparent discomfort.

## II. MEDICAL TESTIMONY

Dr. Robert T. Zellel testified by deposition. He is board certified in Neurological Surgery. Dr. Zellel first saw Ms. Seybold on March 8, 2000, when she arrived complaining of low back and right leg pain. She reported that on January 4, 2000, while lifting the engine cover of her school bus, she experienced significant low back pain. On the following day the pain became more severe and was centered in her back, buttocks and into the left leg stopping at her knee. The pain radiated down the right posterior aspect of her right leg entering along the lateral foot. There was also attendant numbness, burning and some weakness in the leg. She denied ever having experienced these symptoms prior to January 4, 2000.

Dr. Zellel reviewed a lumbosacral MRI that revealed a right-sided herniated disc between the fifth lumbar and first sacral vertebrae. Dr. Zellel's impression was that the patient suffered from symptoms caused by a right-sided herniated disc resulting in right first sacral nerve root radiculopathy. Dr. Zellel recommended physical therapy and treatment with medications.

Ms. Seybold returned on March 29, 2000. Physical therapy had only partially helped with some of her complaints. Dr. Zellel recommended additional tests and on May 11, 2000, performed a surgical laminectomy and discectomy at L5-S1. Ms. Seybold returned to his office May 19, 2000. She stated that she was better, but there was still soreness and some residual symptoms in the right first sacral nerve root distribution. Dr. Zellel believed these symptoms to be due to residual inflammation of the decompressed nerves from the original herniated disc.

She returned on May 26, 2000, because of concern for swelling in her low back. Her examination was quite favorable. She exhibited an intact sensory and motor status and appeared to be happy with the overall results achieved. She returned June 5, 2000, and was doing much better. Dr. Zellel could not detect any abnormalities on her examination including sensory and motor surveys. Dr. Zellel allowed her to return to work one week from June 5, 2000, with an initial twenty-five pound lifting restriction. After two weeks, unless new symptoms or complaints developed, she would be returned to work without restrictions other than those dictated by her symptoms.

Ms. Seybold returned to Dr. Zellel on August 7, 2000, complaining of developing cramps in some of her leg muscles. She stated there was numbness along the outside of her right three toes. After walking a few hundred yards both of her legs were described as becoming weak. She had, however, returned to work. Dr. Zellel believed that Ms. Seybold needed post-operative reconditioning physical therapy. He ordered flexion-extension spine films, a lumbosacral myelogram, post-myelogram CAT scan and electro diagnostic survey. These tests were performed but did not support her subjective complaints. Dr. Zellel indicated that he had no clear neurologic diagnosis for her continued complaints.

Based upon the history Ms. Seybold gave him about the relationship of the pain to the engine cover lifting incident and the lack of any previous history of back injury, it was Dr. Zelle's opinion that the lifting incident more likely than not resulted in the ruptured disc and the surgery that he had to perform. By October 2000, he felt she had reached maximum medical improvement and was able to return to work. He assigned her a ten percent (10%) impairment to the person as a whole. According to Dr. Zelle, if she had a pre-existing history of back injuries, that circumstance could have affected his opinion as to causation. Dr. Zelle indicated it was possible that she had the herniated disc sometime well before January 2000. He indicated that his opinion, to a large degree, was based upon the history given by Ms. Seybold.

Dr. Robert Clendenin, III, testified by way of deposition. He is a physiatrist, which is a specialist in the non-surgical treatment of musculoskeletal disorders. Dr. Clendenin first saw Ms. Seybold on March 2, 2001, on a referral from Dr. Zelle. She told him she worked for CMCSS as a school bus driver, and had been injured on January 4, 2000, when lifting an engine cover during her pre-trip inspection. She developed pain in the lower back and right leg. She was seen by Dr. Zelle and found to have a herniated disc at the L5-S1 level. On May 11, 2000, she underwent a laminectomy and discectomy. She had persistent problems, and had undergone an MRI on February 12, 2001, which revealed a degenerative disc with a left paracentral protrusion at L4-5 with some post-operative scarring on the right where she had her surgery.

She had undergone EMG studies in October 2000, which were normal. When Dr. Clendenin saw her, she was complaining primarily of lower back pain with right leg pain that radiated down into her right buttock and down into the toes. Ms. Seybold also told Dr. Clendenin that she had gone through physical therapy without improvement. Dr. Clendenin performed a physical examination of Ms. Seybold. He measured the circumference of her calf muscles and they were normal or symmetrical. There was no evidence of any atrophy or wasting of the muscle of the right leg. She had normal strength and normal straight leg raising tests. Dr. Clendenin agreed with Dr. Zelle that there was nothing surgically correctable. He recommended Neurontin, a medication that is often helpful for nerve-type pain and advised that she try to go back to regular work on March 19, 2001.

Ms. Seybold returned to Dr. Clendenin on March 28, 2001, with similar complaints. She related that she could not tolerate the Neurontin and had chosen not to return to work. Her examination was unchanged overall. Dr. Clendenin's impression was that she had subjective complaint of back and leg pain. She reported having pain but, objectively, all her imaging studies, her diagnostic EMG and her physical findings looked normal. At that point he did not have any other treatment suggestions. He could not see any objective reason she could not return to work as a school bus driver if she so desired. According to Dr. Clendenin, it is normal for someone who has a simple one-level disc herniation laminectomy to return to work. Dr. Clendenin agreed with Dr. Zelle's ten percent impairment rating.

Dr. Clendenin found in his hand-written notes some mention of a prior back injury at work. Dr. Clendenin indicated that when a physician forms an opinion as to the cause of a specific problem, he must rely upon what the patient tells him or her as to when the pain starts and when it ends. After reviewing her prior treatment records, Dr. Clendenin admitted that it certainly appeared that Ms. Seybold had previous back problems. He testified that the prior history did not prove she did not, in fact, “develop more pain after she lifted that day at work.”

Dr. Richard Allen Berkman, a neurosurgeon, testified by deposition. He first saw Ms. Seybold on July 10, 2001. She reported that she had lifted an engine cover inside a school bus and injured her back. Six months after the onset of symptoms, she underwent a lumbar laminectomy. She reported having never improved following the surgery. She had a post-operative MRI performed in February 2001 which revealed scarring but no evidence of a recurrent disc rupture.

Dr. Berkman performed a physical examination and recommended a vascular examination and pain clinic evaluation. The vascular examination ruled out a blood clot as causing the leg pain. He also had an MRI performed that did not reveal a recurrent disc rupture. Dr. Berkman referred Ms. Seybold to a pain specialist, Dr. John Culclasure. Dr. Culclasure recommended a selective epidural steroid injection and consideration of spinal cord stimulation. A steroid injection to reduce the swelling around a nerve was given on September 21, 2001. After that injection it was decided to proceed with a spinal cord stimulator trial. The trial was given on November 20, 2001. A dorsal column stimulator is an electrode that you place on top of the lining of the spinal cord in the thoracic area. It transmits an electric signal into the spinal cord that dampens the signal traveling from the legs to the brain that are transmitting pain signals. During the trial Ms. Seybold reported the deep leg pain was not any better but the back and buttock pain had lessened and she wanted to proceed with permanent implantation. This was an elective decision on the part of Ms. Seybold and was done on January 15, 2002.

Dr. Berkman saw her again on April 17, 2002. She said that her leg pain had not changed but that her back and buttock pain had improved which is the same as found during the trial and was not an unexpected outcome. According to Dr. Berkman, Ms. Seybold could not drive a school bus during any of this period of time. He is also not sure that she could drive a school bus with a dorsal column stimulator in place. It occasionally causes the ankles to move suddenly and that could create a problem for a school bus driver.

In Dr. Berkman’s opinion, Ms. Seybold has sustained a thirteen percent whole person impairment according to the *AMA Guides*. Dr. Berkman was asked if in his opinion the work incident described by Ms. Seybold caused the injuries or the symptoms that he treated her for. He responded, “[g]iven that no other history has been provided to me that pre-dates the school bus injury, I would have to rely on the judgment of Dr. Zelle and what the patient told me to reach that conclusion, and the conclusion would be yes.” On cross-examination Dr. Berkman confirmed that there was nothing in his examination that would have objectively explained the pain that Ms. Seybold was having. He ordered an EMG, an MRI and a vascular examination. None of those studies revealed or explained the pain she was describing to him. According to Dr. Berkman, the

combination of surgery, an epidural steroid block, Neurontin, and a stimulator without relief to the patient would be highly unusual.

Dr. Berkman testified there was no indication in his record that Ms. Seybold had given him a history of back problems with low back pain radiating into her legs prior to the incident of lifting the engine cover. If she had prior back problems, had been to many doctors complaining of back pain radiating into her legs and had sought continuous treatment for years, that would cause Dr. Berkman to question his opinion as to the cause of her problems. Dr. Berkman stated that in order to evaluate the effect of her prior history on his opinion he would need access to her previous medical records. He testified that he had not seen any records relating to prior treatment.

### III. RULING OF THE TRIAL COURT

The trial court found that Ms. Seybold had a pre-existing condition in her lower back in that she had sustained multiple injuries over several years and had regularly sought medical treatment complaining of back pain radiating into her legs. The trial court concluded that Ms. Seybold had failed to prove her pre-existing condition was aggravated or advanced by the incident Ms. Seybold alleges to have occurred on January 4, 2000, and dismissed the claim for workers' compensation benefits.

### IV. SCOPE OF REVIEW

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143, 149 (Tenn. 1989); Tenn. Code Ann. § 50-6-225(e)(2). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be afforded those circumstances on review since the trial court had the opportunity to observe the witness' demeanor and to hear the in-court testimony. *Long v. Tri-Con Indus., Ltd.*, 996 S.W.2d 173, 178 (Tenn. 1999). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions and the reviewing court may draw its own conclusions with regard to those issues. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991).

### V. ANALYSIS

In a workers' compensation case, the employee has the burden of proving every essential element of his or her claim. *White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992). In order to be eligible for benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." Tenn. Code Ann. § 50-6-102(12). In the instant case, it is apparent to us, as it was to the trial court, that Ms. Seybold had previously sustained numerous injuries to her back, some of them disabling. The issue this circumstance presented to the trial court was whether the condition in her back was sufficiently aggravated by the

incident described by Ms. Seybold to be a compensable injury.

The general rule is that aggravation of a pre-existing condition may be compensable but not if it results only in increased pain or other symptoms caused by the underlying condition. *Cunningham v. Goodyear Tire and Rubber Co.*, 811 S.W.2d 888, 891 (Tenn. 1991). An employer is responsible for workers' compensation benefits, even though the claimant may have been suffering from a serious pre-existing condition or disability, but only if the employment causes an actual progression or aggravation of the prior disabling condition or disease. *Hill v. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483, 488 (Tenn. 1997); *White v. Werthan Indus.*, 824 S.W.2d 158, 159 (Tenn. 1992); *Talley v. Virginia Ins. Reciprocal*, 775 S.W.2d 587, 591 (Tenn. 1989). While it is true that an employer takes the employee with all pre-existing conditions and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability greater than if he or she had not had the pre-existing conditions; if work aggravates a pre-existing condition merely by increasing pain, there is no injury by accident. *Sweat v. Superior Indus., Inc.*, 966 S.W.2d 31, 32 (Tenn. 1998). To be compensable, the pre-existing condition must be advanced, there must be anatomical change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. *Id.* at 33 .

Causation and permanency of a work-related injury must be shown in most cases by expert medical evidence. *Seay v. Town of Greeneville*, 587 S.W.2d 381, 383 (Tenn. 1979). Medical proof that the injury was caused in the course of the employee's work must not be speculative or so uncertain regarding the cause of the injury that attributing it to the plaintiff's employment would be an arbitrary determination or a mere possibility. *Patterson v. Tucker Steel Co.*, 584 S.W.2d 792, 794 (Tenn. 1979). The only history Ms. Seybold's doctors had was that the onset of pain occurred January 4, 2000, when she was lifting the motor cover. Consequently, they based their opinions on the history they were given and rendered the opinion that her injury was caused by this event. It is patently obvious that their testimony failed to establish whether the incident aggravated or advanced Ms. Seybold's pre-existing condition since these physicians were unaware of it. As the trial court noted, they were unaware of her previous condition because Ms. Seybold failed to tell them about it.

As a result of Ms. Seybold's secreting her prior history of back problems, there is, quite simply, no expert medical evidence concerning the issue of whether the January 4, 2000, lifting incident aggravated or advanced her pre-existing back injuries. Based solely upon the medical evidence, any determination made in this regard would be an arbitrary one. The only other evidence relating to this issue was offered by Ms. Seybold. The trial court did not find Ms. Seybold to be a credible witness and pointed out numerous ways her testimony contradicted itself. While this court must give great deference to the trial court's conclusions relating to issues of credibility when the trial judge has personally observed the testimony, the record clearly supports the trial court's finding.

## V. CONCLUSION

After a careful review of the record in this case, we are of the opinion that the evidence does not preponderate against the trial court's finding that Ms. Seybold had an injury to her back that predated the January 4, 2000, incident for which she is claiming benefits. We further agree with the trial court that there is no expert medical evidence that the pre-existing condition was aggravated or advanced beyond increased pain and there is no other credible evidence from which such a determination could be made. It follows that the judgment of the trial court is affirmed. The costs of the cause shall be taxed to the Appellant, Debra Ann Seybold.

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DONALD P. HARRIS, SR. J.

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
NOVEMBER 29, 2005 SESSION

**DEBRA ANN SEYBOLD v. CLARKSVILLE MONTGOMERY COUNTY  
SCHOOL SYSTEM**

**Chancery Court for Montgomery County  
No. 2002-03-0034**

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**No. M2005-00259-WC-R3-CV - Filed - April 11, 2006**

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**JUDGMENT**

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appeals to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the Appellant, Debra Ann Seybold, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM